Intermec Technologies Corp. v. Palm, Inc. Doc. 108 Att.

EXHIBIT

2

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[redacted] ORIGINAL [redacted]

SUM-100

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

FILED
FEB -2 09
David H. Yamasaki, Clerk of the Superior Court
County of Santa Clara, California
By: B. CHOPOFF Deputy Clerk

SUMMONS
(CITACION JUDICIAL)

NOTICE TO DEFENDANT:
(AVISO AL DEMANDADO):
NETFLIX, INC. and WALMART.COM USA, LLC

YOU ARE BEING SUED BY PLAINTIFF:
(LO ESTÁ DEMANDANDO EL DEMANDANTE):
OSCAR MACIAS, on behalf of himself and others similarly situated

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (www.lawhelpcalifornia.org), the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), or by contacting your local court or county bar association.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (www.courtinfo.ca.gov/selfhelp/espanol/), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, (www.lawhelpcalifornia.org), en el Centro de Ayuda de las Cortes de California, (www.courtinfo.ca.gov/selfhelp/espanol/) o poniéndose en contacto con la corte o el colegio de abogados locales.

The name and address of the court is:
(El nombre y dirección de la corte es):
SANTA CLARA COUNTY SUPERIOR COURT
191 N. First Street, San Jose CA 95113

CASE NUMBER: *(Número del Caso):* 109CV133878

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:
(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):
KING & FERLAUTO, LLP, Thomas M. Ferlauto, 1880 Century Park East, Suite 820, Los Angeles CA 90067
phone (310) 552-3366, fax (310) 552-3289

DATE: *(Fecha)* FEB 0 2 2009 — Chief Executive Officer/Clerk DAVID H. YAMASAKI — Clerk, by *(Secretario)* B. CHOPOFF, Deputy *(Adjunto)*

(For proof of service of this summons, use Proof of Service of Summons *(form POS-010).)*
(Para prueba de entrega de esta citatión use el formulario Proof of Service of Summons, *(POS-010)).*

[SEAL]

NOTICE TO THE PERSON SERVED: You are served
1. ☐ as an individual defendant.
2. ☐ as the person sued under the fictitious name of *(specify)*:
3. ☐ on behalf of *(specify)*:

under: ☐ CCP 416.10 (corporation) ☐ CCP 416.60 (minor)
☐ CCP 416.20 (defunct corporation) ☐ CCP 416.70 (conservatee)
☐ CCP 416.40 (association or partnership) ☐ CCP 416.90 (authorized person)
☐ other *(specify)*:

4. ☐ by personal delivery on *(date)*:

Form Adopted for Mandatory Use
Judicial Council of California
SUM-100 [Rev. January 1, 2004]

SUMMONS

Code of Civil Procedure §§ 412.20, 465

American LegalNet, Inc. www.USCourtForms.com

KING & FERLAUTO, LLP
1880 CENTURY PARK EAST, SUITE 820
LOS ANGELES, CALIFORNIA 90067-1627
PHONE (310) 552-3366
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Thomas M. Ferlauto, SBN 155503

Attorneys For: *Plaintiff OSCAR MACIAS and the Proposed Class*

FILED
FEB -2 09
David H. Yamasaki, Clerk of the Superior Court County of Santa Clara
By: B. CHOPOFF Deputy Clerk

FILED Santa Clara Co
02/02/09 12:09pm
David H. Yamasaki
Chief Executive Offic
By: bettyc DTSCIV0101
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CK $900.00
TL $900.00
Case: 1-09-CV-133878

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

OSCAR MACIAS, on behalf of himself and others similarly situated,

Plaintiff,

v.

NETFLIX, INC. and WALMART.COM USA, LLC,

Defendants.

Case No. 109CV133878

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

Complex Litigation Division

File by Fax

Plaintiff for this Complaint brought under California law against California Defendants for California residents for treble damages and injunctive and declaratory relief against Netflix, Inc. ("Netflix") and Walmart.com USA, LLC ("Walmart.com") (hereinafter collectively, "Defendants"):

UNDERLYING FACTS

1. On or about May 19, 2005, Netflix and Walmart.com (a wholly owned subsidiary of Wal-Mart Stores, Inc.) agreed to divide the markets for the sales and online rentals of DVDs in the United States ("Defendants' Unlawful Market Division Agreement"), with the specific purpose and intended effect of monopolizing and otherwise unreasonably restraining trade in the online DVD rental market.

2. Prior to entering into the Defendants' Unlawful Market Division Agreement, Netflix and Walmart.com were essentially the only direct competitors in the online DVD rental business, and both were also competitors in directly selling DVDs to consumers.

3. By May 2005, Netflix and Walmart.com (a wholly owned subsidiary of Wal-Mart Stores, Inc.) entered into an agreement by which Walmart.com would cease competing with Netflix in the online DVD rental business, and Netflix would promote the sales of new DVDs by Walmart.com online (and Wal-Mart Stores). In exchange, Netflix agreed to cease any sale of new DVDs.

4. Defendants' conspiracy enabled Netflix to increase its overpricing (and profits) by establishing higher subscription rates for DVD rentals. As a result of this contract, as well as Netflix's unlawfully and illegally obtained and maintained market and monopoly power, Netflix subsequently did in fact overcharge Plaintiff and Class members for subscription fees.

5. Under the Defendants' Unlawful Market Division Agreement, Netflix and Walmart.com agreed that they would restrain trade and eliminate competition. Walmart.com agreed that it would stop competing with Netflix in the online rental market. Netflix agreed that it would not sell new DVDs, but instead would promote the DVD sales of Walmart.com (and Wal-Mart Stores).

6. In promoting the sale of DVDs by Walmart.com (and Wal-Mart Stores), Netflix provided "consideration" for the agreement by Wal-Mart Stores and Walmart.com, so that Walmart.com would exit the online DVD rental market and simultaneously confirmed to Walmart.com (and Wal-Mart Stores) that Netflix would not enter the market to sell new DVDs, as Netflix was well-positioned and otherwise had the unilateral economic incentive to do.

7. Since entering into the Defendants' Unlawful Market Division Agreement, neither Wal-Mart Stores nor Walmart.com has rented DVDs online and Netflix has not sold new DVDs online to customers. The Defendants' Unlawful Market Division Agreement served to entrench and enhance Defendants' respective dominant positions in this market and otherwise cause harm to competition, including enabling Netflix to charge higher subscription rates for online DVD rentals than it would have had they not entered into the agreement.

8. Online DVD "rentals" are a distinct and separate market from DVD "sales." The price of a new DVD depends heavily on how popular it is, including whether it is a new release or how successful the title originally was at the box office or on television. By contrast, online DVD renters generally charge based on a monthly or yearly subscription fee.

9. Plaintiff and all other similarly situated consumers in fact paid higher subscription prices to Netflix.

10. This case is brought as a Class Action filed on behalf of all consumers in California who, during the period May 19, 2005 to the present, paid a subscription fee to rent DVDs from Netflix.

PLAINTIFF

11. OSCAR MACIAS is an individual consumer who resides in the State of California. During the Class Period, Plaintiff MACIAS directly subscribed to Netflix for his personal, non-commercial use. Plaintiff MACIAS is a member of the proposed Class and has been injured by Defendants' conduct.

DEFENDANTS

12. Defendant Netflix is a corporation headquartered at 100 Winchester Circle, Los Gatos, California, 95032. Through its website, www.netflix.com, Netflix rents DVDs directly to consumers nationwide by charging monthly subscription fees, which allows customers to rent DVDs pursuant to various subscription plans. Netflix has possessed a market share of no less than 75% of the online DVD rental market in the United States at all times during the Class Period.

13. Defendant Walmart.com is a wholly-owned subsidiary of Wal-Mart Stores. Walmart.com is a Delaware company with its headquarters and operations at 7000 Marina Boulevard, Brisbane, California, 94005. It is the online component of Wal-Mart Stores' retail empire that is the leading seller of new DVDs in the United States. Prior to the conspiracy alleged herein, Walmart.com was also a major competitor of Netflix in the online DVD rental

market through the "Walmart DVD Rentals" service. Through the website, www.walmart.com, Defendant Walmart.com sells DVDs directly to consumers nationwide.

JURISDICTION AND VENUE

14. This Complaint is filed pursuant to California Business and Professions Code sections 16720, *et seq.*, commonly known as the Cartwright Act. Under California Business and Professions Code section 16750(a), Plaintiffs seek to recover treble the damages Plaintiffs and the members of the Class have sustained due to Defendants' illegal activities.

15. Venue is proper in Santa Clara County under California Business and Professions Code section 16750(a), and California Code of Civil Procedure section 395.5. Defendant Netflix's principal place of business is in Santa Clara County.

16. The amount in controversy for the individual Plaintiff and for each Class member is less than $75,000 per Class member.

17. No portion of this Complaint is brought pursuant to federal law.

18. All the members of the proposed Class are residents of the State of California.

CLASS ALLEGATIONS

19. Plaintiff brings this action on behalf of himself and the members of the Class, defined as comprising:

> All residents of California who paid a "subscription fee" to Netflix to rent DVDs online after May 19, 2005 up to the present.

20. The Class numbers in the thousands. The exact number and identities of the members are known by Defendants. Excluded from the Class are government entities, Defendants, their co-conspirators and their representatives, parents, subsidiaries, and affiliates.

21. The Class is so numerous and geographically dispersed that joinder of all members is impracticable.

22. There are questions of law and fact common to the Class and the members thereof. These common questions relate to the existence of the conspiracy alleged, and to the type and common pattern of injuries sustained as a result thereof. The questions include, but are

not limited to:

(a) Whether Defendants engaged in a contract, combination, or conspiracy to allocate markets;

(b) Whether Defendants unreasonably restrained trade in the online DVD rental market;

(c) Whether Defendants had the specific intent for Netflix to monopolize the online DVD rental market;

(d) The nature and character of the acts performed by Defendants in furtherance of the alleged contract, combination, and conspiracy;

(e) Whether the alleged contract, combination, and conspiracy violated California law;

(f) The anticompetitive effects of Defendants' violations of the law;

(g) Whether Defendants have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the Class as a whole; and

(h) Whether the conduct of Defendants, as alleged in this Complaint, caused Netflix subscription fees to be higher than they otherwise would have been and thereby caused injury to the business and property of Plaintiff and other members of the Class.

23. The questions of law and fact common to the members of the Class predominate over any questions affecting only individual members, including the legal and factual issues relating to liability and damages.

24. Plaintiff is a member of the Class. Their claims are typical of the claims of other members of the Class, and they will fairly and adequately protect the interests of the members of the Class. Their interests are aligned with, and not antagonistic to, those of the other members of the Class.

25. Plaintiff is represented by KING & FERLAUTO, LLP, a law firm experienced with class action antitrust litigation and familiar with the Rules of this Court.

26. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Class treatment will permit the adjudication of relatively small claims by members of the Class who otherwise could not afford to litigate antitrust claims such as are asserted in this Complaint. This class action presents no difficulties of management that would preclude its maintenance as a class action.

FIRST CAUSE OF ACTION

[Violation of Cal. Bus. & Prof. Code Sections 16720 (Cartwright Act)]

(Against All Defendants)

27. Plaintiff incorporates, as though fully set forth herein, each and every paragraph set forth above.

28. Defendants' conduct as alleged in this Complaint violates Cal. Bus. & Prof. Code Section 16720, et seq. (commonly known as the "Cartwright Act").

29. As alleged in this Complaint, Plaintiff and the members of the Class have been injured in their business and property as a result of the Defendants' violation of Section 16720 of the California Business and Professions Code, for which they seek treble damages pursuant to Section 16750, subdivision (a) of that Act.

30. As a proximate result of the Defendants' conduct, Plaintiff and the Class he represents have been damaged in an amount to be proven at trial.

SECOND CAUSE OF ACTION

[Violations of Cal. Bus. & Prof. Code § 16727 (Cartwright Act)]

(Against All Defendants)

31. Plaintiff incorporates and realleges, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

32. Defendants' conduct as alleged in this Complaint further violates Cal. Bus. & Prof. Code Section 16727. The conduct includes, but is not limited to, contracts for the effect of which is to substantially lessen competition or tend to create a monopoly in the trade.

33. For the purpose of restraining trade and maintaining and profiting from its monopoly, Defendants have engaged in unlawful acts.

34. Defendants' behavior alleged herein has had, *inter alia,* the following effects:

(a) Price competition in the DVD rental market has been restrained, suppressed and/or eliminated; and

(b) Those who subscribe to DVD rentals have been deprived of the benefit of free and open competition.

35. Plaintiff and the other members of the Class paid supra-competitive, artificially

inflated prices in the DVD online rental market and higher subscription fees.

THIRD CAUSE OF ACTION

[Violations of Cal. Bus. & Prof. Code § 17200. (Unfair Competition Act)]

(Against All Defendants)

36. Plaintiff incorporates and realleges, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

37. This Complaint is filed and these proceedings are instituted pursuant to sections 17203 and 17204 of the California Business and Professions Code, to obtain restitution, disgorgement, and other available remedies from Defendants for acts and business practices, as alleged herein, in violation of section 17200 of the California Business and Professions Code, commonly known as the Unfair Competition Act.

38. The conduct alleged herein violates California Business and Professions Code section 17200. The acts and business practices, as alleged herein, constituted and constitute a common, continuous, and continuing course of conduct of unfair competition by means of unfair, unlawful and/or fraudulent business acts or practices within the meaning of California Business and Professions Code section 17200, *et seq.*, including, but in no way limited to, the following:

(a) Defendants' acts and business practices as described above constitute violations of California Business and Professions Code section 16720, *et seq.*, as set forth above;

(b) Defendants' acts and business practices as described above constitute violations of California Business and Professions Code section 16727, *et seq.*, as set forth above; and

(c) Defendants' acts and business practices as described above, whether or not in violation of California Business and Professions Code sections 16720 or 16727, *et seq.*, are otherwise unfair, unconscionable, unlawful and/or fraudulent within the meaning of California Business and Professions Code section 17200.

39. Plaintiff and the other members of the Class are each entitled to full restitution or disgorgement of all revenues, earnings, profits, compensation, and benefits which may have been obtained by Defendants as a result of these business acts or practices.

40. The illegal conduct alleged herein is continuing and there is no indication that Defendants will not continue such activity into the future.

FOURTH CAUSE OF ACTION

[Unjust Enrichment]

(Against Defendant Netflix Only)

41. Plaintiff incorporates and realleges, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

42. Defendant Netflix has been unjustly enriched through overpayments of subscription fees by Plaintiff and Class members.

43. Defendant Netflix should not be allowed to retain the monetary benefits conferred via overpayments by Plaintiff and Class members of the subscription fees.

44. Plaintiff seeks disgorgement of all overpayments and establishment of a constructive trust from which Plaintiff and Class members may seek appropriate relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of himself and the members of the Class, prays for judgment against the Defendants, jointly and severally, as follows:

1. Determining that this action may proceed and be maintained as a class action and that Plaintiff be certified as Class representative;

2. That the unlawful trust, combination, agreement, and course of conduct alleged herein be adjudged and decreed to be a violation of section 16720 of the California Business and Professions Code, and that Plaintiff and the other members of the Class have been injured and damaged as a result of Defendants' violation of the Cartwright Act;

3. That Defendant's conduct tended to lessen competition, as alleged herein; that such conduct be adjudged and decreed to be a violation of section 16727 of the California Business and Professions Code, and that Plaintiff and the other members of the Class have been injured and damaged as a result of Defendant's violation of the Cartwright Act;

4. That Defendants be found to have engaged in unfair competition in violation of section 17200 of the California Business and Professions Code;

5. For declaratory relief and damages according to proof at trial, and that such amount be trebled;

6. For reasonable attorneys' fees pursuant to Section 16750(a) of the Business and Professions Code;

7. For prejudgment interest at the highest legal rate, from and after the date of service of the Complaint in this action;

8. Ordering Defendants, and each of them, their agents, servants, and employees, and all persons acting, directly or indirectly, in concert with them, to restore all funds to each member of the Class acquired by means of any act or practice declared by this Court to be unlawful or to constitute unfair competition under Sections 17200, et seq., of the Business and Professions Code;

9. For costs of suit;

10. That Plaintiff and the other members of the Class be granted such other and further relief as the nature of the case may require or as this Court deems just and proper.

DATED: January 30, 2009

KING & FERLAUTO, LLP

By: ______________________
Thomas M. Ferlauto
Attorney For Plaintiffs

CM-010

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Thomas M. Ferlauto (155503) KING & FERLAUTO, LLP 1880 Century Park East, Suite 820 Los Angeles, CA 90067 TELEPHONE NO.: 310-552-3366 FAX NO.: 310-552-3289 ATTORNEY FOR (Name): Plaintiff, OSCAR MACIAS	FOR COURT USE ONLY FILED FEB -2 09 David H. Yamasaki, Clerk of the Superior Court County of Santa Clara, California By: B. CHOPOFF Deputy Clerk
SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA STREET ADDRESS: 191 N. First Street MAILING ADDRESS: 191 N. First Street CITY AND ZIP CODE: San Jose CA 95113 BRANCH NAME: DOWNTOWN SUPERIOR COURT	
CASE NAME: MACIAS v. NETFLIX	

CIVIL CASE COVER SHEET	Complex Case Designation	CASE NUMBER: 109CV133878
[✓] Unlimited (Amount demanded exceeds $25,000) [ ] Limited (Amount demanded is $25,000 or less)	[ ] Counter [ ] Joinder Filed with first appearance by defendant (Cal. Rules of Court, rule 3.402)	JUDGE: DEPT:

Items 1–6 below must be completed (see instructions on page 2).

File by Fax

1. Check one box below for the case type that best describes this case:

Auto Tort
- [ ] Auto (22)
- [ ] Uninsured motorist (46)

Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort
- [ ] Asbestos (04)
- [ ] Product liability (24)
- [ ] Medical malpractice (45)
- [ ] Other PI/PD/WD (23)

Non-PI/PD/WD (Other) Tort
- [ ] Business tort/unfair business practice (07)
- [ ] Civil rights (08)
- [ ] Defamation (13)
- [ ] Fraud (16)
- [ ] Intellectual property (19)
- [ ] Professional negligence (25)
- [ ] Other non-PI/PD/WD tort (35)

Employment
- [ ] Wrongful termination (36)
- [ ] Other employment (15)

Contract
- [ ] Breach of contract/warranty (06)
- [ ] Rule 3.740 collections (09)
- [ ] Other collections (09)
- [ ] Insurance coverage (18)
- [ ] Other contract (37)

Real Property
- [ ] Eminent domain/Inverse condemnation (14)
- [ ] Wrongful eviction (33)
- [ ] Other real property (26)

Unlawful Detainer
- [ ] Commercial (31)
- [ ] Residential (32)
- [ ] Drugs (38)

Judicial Review
- [ ] Asset forfeiture (05)
- [ ] Petition re: arbitration award (11)
- [ ] Writ of mandate (02)
- [ ] Other judicial review (39)

Provisionally Complex Civil Litigation (Cal. Rules of Court, rules 3.400–3.403)
- [✓] Antitrust/Trade regulation (03)
- [ ] Construction defect (10)
- [ ] Mass tort (40)
- [ ] Securities litigation (28)
- [ ] Environmental/Toxic tort (30)
- [ ] Insurance coverage claims arising from the above listed provisionally complex case types (41)

Enforcement of Judgment
- [ ] Enforcement of judgment (20)

Miscellaneous Civil Complaint
- [ ] RICO (27)
- [ ] Other complaint *(not specified above)* (42)

Miscellaneous Civil Petition
- [ ] Partnership and corporate governance (21)
- [ ] Other petition *(not specified above)* (43)

2. This case [✓] is [ ] is not complex under rule 3.400 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:
   a. [ ] Large number of separately represented parties
   b. [✓] Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve
   c. [✓] Substantial amount of documentary evidence
   d. [✓] Large number of witnesses
   e. [✓] Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court
   f. [✓] Substantial postjudgment judicial supervision
3. Remedies sought *(check all that apply)*: a. [✓] monetary b. [✓] nonmonetary; declaratory or injunctive relief c. [✓] punitive
4. Number of causes of action *(specify)*: 4
5. This case [✓] is [ ] is not a class action suit.
6. If there are any known related cases, file and serve a notice of related case. *(You may use form CM-015.)*

Date: January 30, 2009

Thomas M. Ferlauto
(TYPE OR PRINT NAME)

(SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

NOTICE
- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate Code, Family Code, or Welfare and Institutions Code). (Cal. Rules of Court, rule 3.220.) Failure to file may result in sanctions.
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 3.400 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on all other parties to the action or proceeding.
- Unless this is a collections case under rule 3.740 or a complex case, this cover sheet will be used for statistical purposes only.

Form Adopted for Mandatory Use
Judicial Council of California
CM-010 [Rev. July 1, 2007]

CIVIL CASE COVER SHEET

Cal. Rules of Court, rules 2.30, 3.220, 3.400–3.403, 3.740;
Cal. Standards of Judicial Administration, std. 3.10
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